Supreme Court, U.S.
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CASE NO. _____

In The
SUPREME COURT OF THE UNITED STATES

ANTHONY HENRY MANGO,
PETITIONER,

vs.

UNITED STATES OF AMERICA
RESPONDENT.

On Petition for a writ of Certiorari
before judgment to the United States
Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether *Blakely*, *infra*, and *Booker infra*, and *Crawford infra*, are retroactive in application (and whether *Varela*, *infra*, was wrongly decided in the Eleventh Circuit) so that Petitioner's was unconstitutionally sentenced and should be re-sentenced to a lesser sentence.

PARTIES IN THE COURT BELOW

Petitioner, Anthony Mango, was the defendant in the trial court and was the Defendant-Appellant to the Eleventh Circuit Court of Appeals and was then the petitioner in a "Motion under 28 USC section 2255." The Respondent, the United States of America was the Plaintiff and was the Plaintiff-Appellee in the Eleventh Circuit Court of Appeals.

RULE 29.6 STATEMENT

There are no corporations involved and, therefore, no subsidiary corporations.

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The Court should grant certiorari to examine whether *Blakely*, *infra*, and *Booker*, *infra*, and *Crawford*, *infra*, are retroactive in application (and whether *Varela*, *infra*, was wrongly decided in the Eleventh Circuit) and whether Petitioner's constitutional rights were violated at sentencing.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT
COURT OF APPEALS

The Petitioner, Anthony Mango, respectfully prays that a writ of Certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered herein.

OPINIONS BELOW

(A) The Eleventh Circuit Court of appeals dismissed (May 6, 2003) the defendant's original appeal due to an appeal waiver. Appendix A.

(B) The District Court denied Petitioner's motion to vacate, set aside, or correct an allegedly illegal sentence on August 17, 2004. Appendix B.

(C) The District Court denied Petitioner's motion for certificate of appealability on October 19, 2004. Appendix C.

(D) The Eleventh Circuit Court of appeals denied (December 16, 2004) Petitioner's motion for a certificate of appealability. Appendix D.

JURISDICTION TO REVIEW

Jurisdiction of this Court is invoked under Title 28 U.S.C. section 1254(1) and 28 U.S.C.

section 2101(e). The Eleventh Circuit Court of appeals dismissed (on May 6, 2003) the defendant's original appeal due to an appeal waiver. Petitioner's "Motion under 28 USC section 2255" was denied on August 17, 2004. Petitioner's request for a certificate of appealability to the Eleventh Circuit was denied on December 16, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The issue in this case is whether federal sentencing courts must retroactively apply *Blakely*, *infra*, and *Booker*, *infra*, and *Crawford*, *infra*, (and whether *Varela*, *infra*, was wrongly decided in the Eleventh Circuit) and whether Petitioner's constitutional rights were violated at sentencing.

On December 6, 2002 Mango had been sentenced to 210 months imprisonment (17.5 years) followed by five years of supervised release. His sentence occurred before *Blakely* (December 6, 2004) and before *Crawford* (March 8, 2004) and applied the guidelines in a mandatory fashion and in violation of Defendant's constitutional rights and the same defects continued in defendant's appeal.

The Eleventh Circuit Court of appeals dismissed (on May 6, 2003) the defendant's original appeal due to an appeal waiver. Petitioner's "Motion under 28 USC section 2255" was denied on August 17, 2004. Petitioner's request for a certificate of appealability to the Eleventh Circuit was denied on December 16, 2004. This Petition for writ of certiorari to the United States Supreme Court followed.

REASONS FOR GRANTING THE WRIT ARGUMENT: RETROACTIVITY

The petitioner's constitutional rights were violated by the failure to retroactively apply *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *Crawford v. Washington*, 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177; 2004 U.S. LEXIS 1838 (2004).

And the Eleventh Circuit had been incorrect in its interpretation of *United States v. Booker*, ___ U.S. ___, 2005 WL 50108 (U.S. Jan. 12, 2005) and in the case of *Varela v. United States*, No. 04-11725, 2005 U.S. App. LEXIS 2768; 18 Fla. L. Weekly Fed. C 227 (11th Cir. February 17, 2005), wherein the Eleventh Circuit ruled that *Booker* is not retroactive (so there was no basis to ask for rehearing in Petitioner Mango). There is no United States Supreme Court case on the retroactivity issue yet, so it is still an issue with merit. Some circuits have dealt with *Blakely* in the context of 28 U.S.C. section 2255 and they have denied it, so others have filed or will be filing petitions in those types of cases.

The *Varela* decision of the Eleventh Circuit is both unsurprising and uninspiring. As have most district courts in the wake of *Blakely* and *Booker*, the *Varela* decision simply parrots parts of the Supreme Court's ruling in *Schriro v.*

Summerlin, 542 U.S. ___, 124 S.Ct. 2519 (2004) concerning Ring's non-retroactivity to declare that *Blakely* and Booker are not retroactively applicable to cases on collateral review.

Unlike the Seventh Circuit's more thorough and thoughtful effort in *McReynolds v. United States*, 04-2520 (7th Cir. Feb. 2, 2005), the Eleventh Circuit in Varela does not grapple with or even acknowledge that *Schriro* only concerned judge/jury issues and did not consider the possible impact of key burden of proof issues on retroactivity.

Traditionally, the Rules of Evidence did not apply at the sentencing hearing. Therefore, the judge could receive hearsay evidence in imposing a sentence. But because *Blakely* now speaks of sentencing enhancements in terms of the Sixth Amendment, the prior practice might not remain constitutional in a *Blakely* regime. In other words, if a defendant is entitled to have enhancements proved beyond a reasonable doubt, then the rest of the constitutional protections, such as the right to confrontation, should go along with it. In addition, this is also a *Crawford* issue as well as a *Blakely* issue.

Blakely and *Crawford* might be called the Rodney Dangerfield of Supreme Court decisions because they may not always gets the respect it deserves.

But the Supreme Court lawyer in *Blakely* and *Crawford* is getting the respect he is due. That is Jeff Fisher, the (young) Seattle lawyer who argued and won both *Blakely* and *Crawford* last term before the Supreme Court. Judge Stephen Reinhardt, for whom Fisher clerked, described Fisher's accomplishments: "That's like borrowing a sailboat and discovering America—twice."

The Ninth Circuit ruled that *Crawford* stated a new procedural rule and implicated concerns of fundamental fairness and accuracy of criminal proceedings and that it therefore qualified for retroactive application in *Bockting v. Bayer*, 2005 U.S. App. LEXIS 3012 (9th Cir. FEB 22, 2005).

In his initial appeal brief, the Petitioner/Defendant raised the unreliability of the hearsay testimony that was used at his sentencing to calculate the quantity of drugs and his sentence range. In his Petitioner's motion to vacate, set aside, or correct an allegedly illegal sentence filed with the District Court the petition also raised the unreliability of the hearsay testimony that was used at his sentencing to calculate the quantity of drugs and his sentence range, citing *Crawford*. Petitioner also cited Crawford and Blakely in his "Reply to Government's Response to Movant's Motion under 28 USC Sec. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" and in his "Motion to Reconsider" made

to the District Court.

This Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), has been described as potentially affecting thousands of federal prisoners. Id. at 2549 & n.2 (O'Connor, J., dissenting). This Court's recent decision in United States v. Booker, ___ U.S. ___, 2005 WL 50108 (U.S. Jan. 12, 2005), raises similar concerns. If the one-year limitation period begins to run on the date this Court decided *Blakely* and *Booker*, then large numbers of federal prisoners will feel compelled to file section 2255 motions within a year of those decisions rather than risk losing the opportunity to obtain any relief they may provide. And these prisoners will feel compelled to file even though it is not clear whether either *Blakely* or *Booker* involve a "newly recognized right," or whether either of these decisions will ever be made retroactively applicable to cases on collateral review.

The Petitioner Mango in his "Reply to Government's Response to Movant's Motion under 28 Usc Sec. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" argued:

"....many issues in this motion (and in the prosecution's response) revolve around the fact that the defendant's case pre-dates *Crawford* and the even newer related case of *Blakely*. The U.S. Supreme Court might shed greater light on the

proper resolution of Mango's case when the Court hears two cases, *Booker* and *Fanfan* on Oct. 4, the first day of their new term, that address the fallout from the bombshell ruling from the last days of their previous term. It might be wise to delay ruling in Mango's case until after a resolution of those cases."

On December 6, 2002 Mango had been sentenced to 210 months imprisonment (17.5 years) followed by five years of supervised release.

In *Blakely* the Petitioner pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Supreme Court held that the state trial court's sentencing of defendant to more than three years above the 53-month statutory maximum of the standard range for his offense violated the defendant's Sixth Amendment right to trial by jury.

In *FanFan*, a cocaine supplier in Maine facing a 20-year sentence got only six years because the judge said Blakely prevented him from considering the defendant's criminal history or his role as a leader in a criminal organization.

In *Booker*, a Wisconsin crack dealer who had been sentenced to 30 years got his jail term

overturned by an appeals court. The court said *Blakely* prevented the judge in his case from adding time for the defendant's 23 prior convictions.

The sentence for Petitioner Mango was enhanced by a gun and by hearsay about drug quantities in violation of *Crawford* in that the hearsay constituted a fact that increases the penalty for a crime beyond the prescribed statutory maximum and that must be submitted to a jury. In the case for Petitioner Mango, *Crawford* and *Blakely* are related.

It is interesting to note that *Blakely* mentions *Crawford* only once in the dissent of Justice Breyer right near the end (page 29). Breyer's dissent begins: "The Court makes clear that it means what it said in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In its view, the Sixth Amendment says that " 'any fact that increases the penalty for a crime beyond the presecribed statutory maximum must be submitted to a jury.' " " In regard to *Crawford*, Breyer writes "(3) What are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? Cf. *Crawford v. Washington*, 541 U.S. ---- (2004) (slip op., at 27, 32-33) (clarifying the Sixth Amendment's requirement of confrontation with respect to

testimonial hearsay)."

Shortly after the *Blakely* decision, a lawyer said to me "Blakely talks so much about the importance of letting the jury make decisions that it is similar to those pre-Blakely motions you filed." My motions argued for jury nullification or jury pardon, including the argument that a bifurcated trial should occur in drug cases where a defendant had prior "serious drug felonies" that would result in a mandatory life sentence, so that the jury could be urged to reject the sentencing law as a draconian abuse of peaceful adults engaged in consensual conduct. I had previously appealed such sentences, even with Petitions for Writ of Certiorari to the U.S. Supreme Court. I wondered whether anyone was reading them. *Blakely* suggests that someone did read them. *Blakely* reminds me of me.

Granted, Blakely isn't exactly the same argument (and I am sorry I did not make the *Blakely* arguments at times when I could have), however the repeated references in *Blakely* to the importance of jury decision-making are similar.

Although *Blakely* does not endorse my arguments for jury nullification or jury pardon it could lead there. The prosecution might have to decide whether to plead and prove factors that enhance. If the prosecution does so, it might lead to better educated jurors who realize that the

additional jury findings/verdicts cause sentence enhancements. It might lead to jurors learning, through the media or otherwise, that finding prior drug felonies will mean that a mandatory life sentence will be given to someone who has never committed an act of violence in his life, and who has done nothing but engage in peaceful conduct with consenting adults. *Blakely* could lead to jury nullification and jury pardon. Will the prosecution and Congress wait to see if jurors do so, or will they alter the laws to keep juries ignorant of the horrible things that juries unknowingly do (things that would make some jurors physically ill), under laws that elicit the jury's uninformed verdicts?

Criminal defense lawyers instinctively tend to shun bright-line rules. Concepts like fairness and justice generally are more our style. But, much to the surprise of many, the Supreme Court delivered defendants two big Sixth Amendment victories this year in the form of none other than categorical rules in *Blakely* and *Crawford*. It is time for the criminal defense bar to reconsider bright line rules, under certain circumstances.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." There is not much wiggle room in that language. Yet in recent years, these two rights had been watered down considerably.

In the confrontation context, the Supreme Court decided in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) that the Confrontation Clause did not really require confrontation at all. Rather, when a witness gave an incriminating statement and then became unavailable for trial, it was up to the court to determine whether the statement was "reliable" enough to be admitted without cross-examination. This reliability inquiry turned on the pedigree of the hearsay rule invoked and an assessment of the "totality of the circumstances" surrounding the statement to determine whether the statement had "guarantees of trustworthiness."

The *Roberts* standard sounded sensible on its face. After all, courts were directed to allow untested accusations into evidence only when "cross-examination would be of marginal utility" Idaho v. Wright, 497 U.S. 805, 820 (1990). If a judge could confidently conclude that

"cross-examination would be a work of supererogation," (Id. at 819 with quotation omitted) then one could maintain, as the Court had, that excluding the seemingly trustworthy statement because cross-examination was impossible "would be the height of wrongheadedness" as in White v. Illinois, 502 U.S. 346, 356-57 (1992). So long, in other words, as one is prepared to trust judges to reach fair results, one need not insist upon confrontation in every case.

In *Crawford*, the court was asked to abandon the *Roberts* framework in favor of an unequivocal rule barring the admission of "testimonial" statements when cross-examination is impossible. The federal government responded by pouncing on the bright-line nature of the proposal to change. The government framed the question presented in its amicus brief as whether the Confrontation Clause imposes a "categorical prohibition" against testimonial statements (Brief for United States as Amicus Curiae, Crawford v. Washington, No. 02-9410, at I). The government said that the answer flowed inexorably from the inflexible nature of the question: courts cannot always insist upon cross-examination because "Sixth Amendment rights must yield on occasion" to a higher "truth-seeking" goal (Id. at 6). Or, as Justice O'Connor (one of the two justices who advocated keeping the *Roberts* framework) put it at oral

argument, why change to a categorical rule when judges can still reach fair results under a balancing approach?

The answer that was suggested, and that a seven-justice Court ultimately gave, is that the very nature of some rights, such as the right to confrontation, is a prohibition against trusting judges to do the fair thing. One needed to look no further than the *Roberts* framework in practice to comprehend why this is so. Under *Roberts*' totality of the circumstances test, courts were finding almost anything and everything to indicate trustworthiness sufficient to overlook the inability to cross-examine. "Fact" x would indicate reliability in one case, and "fact" z would indicate reliability in the next. What is more, even though the right to confrontation developed specifically to prevent testimony from being given behind closed doors - on an ex parte basis or in an affidavit - some state legislatures had enacted hearsay laws that allowed states to introduce their private interviews of victims and witnesses in cases involving allegations of child or domestic abuse, or involving elderly victims. See, e.g., *Snowden v. State*, 846 A.2d 36 (Md. App. 2004) (Maryland's child hearsay statute); Or. Rev. Stat. § 40.460 (domestic violence cases); *People v. Pirwani*, ___ P.3d ___, 2004 WL 1375310, at *7 (Cal. App. June 21, 2004) (collecting elderly victim statutes).

So long as courts found the statements reliable, there was no confrontation problem.

Even when specific hearsay laws were not on the books, prosecutors were increasingly allowed to introduce statements that non-testifying witnesses (often alleged accomplices) made during police interrogations, grand jury proceedings, and allocutions. *See Crawford*, 124 S. Ct. at 1371-72.

In one recent pre-*Crawford* case in North Carolina, the prosecution simply introduced a witness' affidavit accusing the defendant of committing the crime. See *State v. Clark*, ___ S.E.2d ___, 2004 WL 1485831 (N.C. App. July 6, 2004). It is difficult to conceive of a more direct affront to the history and purpose of the Confrontation Clause.

In *Crawford,* the Court said enough was enough. The track record of the *Roberts* framework, it explained, "reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion" 124 S. Ct. at 1373. And this constraint cannot be enforced properly if it is not enforced categorically: The Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.... By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are

manipulable," the Court continued, and they fail to provide "meaningful protection" against overly subjective or politically charged decisionmaking, 124 S. Ct. at 1373-74.

Accordingly, the Court ruled that the Confrontation Clause erects an unequivocal rule barring the admission of testimonial statements if the declarant has not been, and cannot be, subjected to full cross-examination.

The *Blakely* case follows a similar storyline. Everyone knows by now how "sentencing factors" - factors that affect defendants' sentences but that legislatures often place outside of the normal processes for adjudicating guilt - proliferated in the past few decades. The Supreme Court declared in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that it would not tolerate attempts to make an end run around the Sixth and Fourteenth Amendments simply by labeling facts that made a crime more serious as sentencing factors.

But the question remained whether legislative sentencing guidelines and other legislation clearly aimed (at least in significant part) at increasing fairness in punishment - not stripping defendants of pre-existing safeguards - should nevertheless be subject to the jury trial and beyond-a-reasonable-doubt guarantees. That, in a sense, was the issue in *Blakely*. And the Court's internal debate and ultimate answer echoed the

proceedings in *Crawford*.

Washington State and the federal government argued in *Blakely* that although the procedures for finding "aggravating facts" under Washington's sentencing guidelines might formally be susceptible to the *Apprendi* rule, they were constitutional because they did not disadvantage defendants by moving facts that ordinarily would be part of the guilt phase into the sentencing process. So long as a legislature did not make an offender's punishment turn too heavily on sentencing factors, the argument went, then legislatures could entrust judges to make some fact-finding that increased offenders' sentences.

This approach made sense to the justices often labeled as "pragmatists" on the Court. Writing for the four *Blakely* dissenters, Justice O'Connor stated: "If indeed the choice is between adopting a case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and applying a rigid rule that destroys everything in its path, I will choose the former." 124 S. Ct. at 2663 (2004). Once again, even if these characterizations stacked the deck just a bit, the message was that balancing tests lead to more equitable results than bright-line rules.

And once again, the majority disagreed. Pointing to actual cases, much like in *Crawford*,

showing that a balancing test could not constrain judicial fact-finding that increased sentences even " times the standard maximum," the Court held that enforcing *Apprendi* even in the context of sentencing guidelines was necessary to give "intelligible" content to the Sixth Amendment right to trial by jury. "Whether the Sixth Amendment incorporates [the dissent's] manipulable standard rather than *Apprendi's* bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of the jury power up to judges' intuitive sense of how far is too far. We think that claim is not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the government to mark out the role of the jury."

The lesson of *Crawford* and *Blakely* is not that criminal defense lawyers (or anyone else) should woodenly advocate bright-line rules to the exclusion of fairness and justice. To the contrary, the lesson is that bright-line rules are often the best way to achieve fairness and justice. Certain rights can be preserved only through strict enforcement of categorical guarantees, and when the Framers drafted certain rights in absolute terms, they had good reason to do so.

Viewed in this light, it behooves criminal defense lawyers to examine other legal problems in

terms of the virtues of bright-line rules. Many already are doing this in the context of terrorism prosecutions. Indeed, it is no coincidence that the four justices who took the hardest line against the government in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). *Hamdi* held that persons who the president calls "enemy combatants" are entitled to some due process, were all in the *Crawford* majority, and were four of the five in the *Blakely* majority. And, as issues concerning the constitutionality of the federal sentencing guidelines come to a head following *Blakely*, the debate ought to focus on whether the federal guidelines can be distinguished in a way that would be true to the clear Sixth Amendment line drawn in that decision.

But bright-line rules can be just as essential - to borrow the *Crawford* Court's phrase - in more "run-of-the-mill" cases (124 S. Ct. At 1373) and regarding more straightforward constitutional disputes. For especially in state courts where judges often must stand for election, judicial balancing tests can quickly balance away a defendant's rights. Examples might include the Supreme Court's Eighth Amendment "disproportionate punishment" jurisprudence or of any number of Fourth Amendment doctrines.

Defense counsel is better off arguing that, with all due respect, the Constitution prohibits judicial discretion on a matter, and that it does so

for a good reason: because a bright-line rule is essential to give intelligible content to a provision in the Bill of Rights.

The government might argue that Petitioner's issues were waived via an appeal waiver. An appeal waiver cannot enable the trial court to commit unconstitutional acts, nor to "legislate" or to "create" laws that do not exist or should not exist (e.g. the sentencing guidelines).

In addition, movant continues to rely on *United States v. Romano*, 314 F.3d 1279 (11th Cir. 2002), which is even more potent after *Crawford* and *Blakely*. It is even more compelling under *Blakely*, that defendant should not have expected to have a gun enhancement, in that the charge was dismissed by the government. It is even more compelling under *Crawford*, that the defendant should not have expected to have hearsay used to enhance his drug quantity. Compared with *Romano*, the prosecution's behavior toward Petitioner Mango at sentencing did not seem as "bad" (as egregious of a violation of the plea agreement) before *Crawford* and *Blakely*. Now that *Crawford* and *Blakely* exist, there is another layer added to the prosecution's behavior, and the corresponding analysis under *Romano*.

The Eleventh Circuit's decision in the case for Petitioner Mango pre-dates *Crawford* and *Blakely* so the prior resolution of Petitioner's case

in the Eleventh Circuit is in question.

Petitioner/Defendant was misinformed that the gun in count 2 of the indictment (dismissed) would not be used to increase his sentence. Instead, the gun in Count 2 (dismissed) was used to increase his sentence with a two level increase in the offense level. At sentencing Petitioner Mango was denied effective assistance of counsel in that no motion was made to withdraw the plea based on the violation of the plea agreement in regard to the dismissed gun charge in count 2 and Petitioner Mango was not informed that he could move to withdraw his plea.

Blakely not only supports Petitioner Mango in his original ineffective assistance of counsel analysis, but *Blakely* in fact suggests that Mango was correct in that he should not have been enhanced by the dismissed gun count.

Petitioner Mango had his sentence increased by two-levels because of the firearm. Any reasonable defendant would have believed that the gun would not be used to enhance because it was dismissed by the prosecution. *Blakely* supports Petitioner in that regard.

Crawford and *Blakely* should have retroactive application on collateral review. There should be no question that *Crawford* and *Blakely* are applicable to the instant case. Where confrontation clause violations are at issue, the

Supreme Court has consistently held that the matter so serious that a new ruling applying that constitutional precept must be given retroactive effect on collateral review. These holdings have consistently been applied throughout the Supreme Court's past thirty eight (38) years of Confrontation Clause decisions.

The Supreme Court in *Schriro v. Summerlin*, 542 U.S. ___. 124 S.Ct. 2519 (2004), altered its inquiry under *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), by making the question of whether a decision is procedural or substantive a threshold inquiry about a new rule of constitutional law.

When the Supreme Court decided *Bruton v. United States*, 391 U.S. 123, 107 S. Ct. 1614, 95 L.Ed.2d 162 (1968), the question arose as to whether that decision was to be given retroactive application. Approximately one month later, the Supreme Court decided that questions affirmatively: "... retroactivity in *Bruton* is [ ]required; the 'error went to the basis of fair hearing and trial' because the procedural apparatus never assured the [petitioner] a fair determination of his guilt or innocence.

Roberts v. Russell, 392 U.S. 293, 294, 88 S. Ct. 1921 (1968) (citing *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965) (change in law will be given effect while case on

direct review; effect of the subsequent ruling of invalidity on prior final judgments on collateral attack not subject to absolute retroactive invalidity; depends instead on consideration of particular relations and particular conduct of rights claimed to have become vested, of status, of prior determinations deemed to have finality, and of public policy in the light of the nature both of the statute and of its previous application).

Addressing the impact of the retroactive applicability of *Bruton*, the Court held: "Although *Bruton* involved a federal prosecution and this is a state prosecution, the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment." and it added "... even if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." *Roberts v. Russell*, supra, 392 U.S. at 295, 88 S. Ct. at 1922 (citing *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 4415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965)). See also *Amaker v. Lacy*, 941 F. Supp. 1340, 1348 (E.D.N.Y. 1996).

Seven months after its decision in *Roberts v. Russell, supra*, the Supreme Court again addressed the Confrontation Clause, in *Barber v. Page*, 390

U.S. 719; 88 S. Ct. 1318; 20 L. Ed. 2d 255 (1968). There, the Court held that the use of the transcript of a codefendant's preliminary hearing testimony in petitioner's state trial deprived him of his federal constitutional right to confrontation in violation of the Sixth and Fourteenth Amendments to the United States Constitution. U.S. Const. Amend. VI and XIV. His contention had been rejected by the lower federal courts, but the United States Supreme Court reversed, holding that the objective of the Confrontation Clause was to prevent depositions or ex parte proceedings from being used against defendants, in lieu of a personal examination and cross-examination of the witness. This would guarantee the accused had an opportunity not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with the jury in order to afford them the opportunity to look at him and judge his demeanor upon the stand.

Addressing the retroactive application of *Barber v. Page*, the Supreme Court held: "Clearly, petitioner's inability to cross-examine Dunston at trial may have had a significant effect on the integrity of the fact finding process." And added "As we pointed out in *Barber v. Page*, one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of the witness

... Accordingly, we can see no reason why *Barber v. Page* should not be given fully retroactive application." *Berger v. California*, 393 U.S. 314, 315, 89 S. Ct. 540, 541, 21 L.Ed.2d 508 (1969).

Twenty-eight (28) years after *Berger*, the Supreme Court decided *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714 (1987). The Court there held that the introduction of a co-defendant's interlocking confession violated the confrontation clause. Four (4) years later, the United States Court of Appeals for the Second Circuit ruled that *Cruz* was to be given retroactive application, a decision which the Supreme Court declined to review. *Graham v. Hoke*, 946 F.2d 982 (2d Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 890 (1992): "We believe that the rule announced in *Cruz* falls within this second exception [set forth in *Teague v. Lane*, 489 U.S. 288; 109 S. Ct. 1060; 103 L. Ed. 2d 334 (1989)]. *Cruz* recognized the risk of inaccurate results stemming from the admission of a nontestifying codefendant's confession even if that confession interlocks with that of the defendant." And also "Accordingly, ... the *Cruz* rule applies to convictions on collateral review." 946 F. 2d at 993-94.

This rule was also adopted by New York State's highest court: "As the rule announced in *Cruz* is central to an accurate determination of guilt or innocence, the Supreme Court determined

the admission of the codefendant's inculpatory confession against the defendant undermined the fundamental fairness of the trial where, as here, there was no opportunity for cross-examination to test the reliability of the codefendant's confession. Therefore, we conclude that retroactive application of *Cruz* is constitutionally commanded on collateral review of a conviction." *People v. Eastman*, 85 N.Y.2d 265, 624 N.Y.S.2d 83 (citing *Graham v. Hoke*, supra.)

Thus, throughout the past thirty-eight (38) years since it decided *Bruton v. United States*, supra, the Supreme Court has consistently given retroactive applicability to cases involving a criminal defendant's right of confrontation.

The Supreme Court's decision in *Crawford*, *supra.*, and in *Blakely*, *supra.*, are therefore applicable to Petitioner Mango.

Petitioner Mango is able to make an "actual innocence" argument regarding the drug quantity and the gun enhancement for which Mango was punished at sentencing, and which Mango disputed at sentencing, based on the argument that aggravating factors have to be pled and proven. *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), *cert. denied*, 517 U.S. 1161 (1996). In the decade since the Fourth Circuit expressly allowed such claims, *Maybeck*, district courts have published few opinions adjudicating "actual

innocence" of a non-capital sentence. Two of these cases involved misapplication of the federal sentencing guidelines. *Alston v. United States*, 235 F. Supp. 2d 477 (D. S.C. 2002); *Berger v. United States*, 867 F. Supp. 424 (S.D. W.Va. 1994). The other two involved federal defendants who received prison sentences for which they were statutorily ineligible, and these petitioners received relief as a result of their habeas petitions. *United States v. Payne*, 990 F. Supp. 412 (D. Md. 1998); *Mobley v. United States*, 974 F. Supp. 553 (E.D. Va. 1997).

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner Anthony Mango respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT
02-16763-II

UNITED STATES OF AMERICA
v.
ANTHONY HENRY MANGO

On appeal fom the United States District Court
for the Middle District of Florida

BEFORE: ANDERSON, BLACK and HULL, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss this appeal based upon the appeal waiver in Appellant's plea agreement is

GRANTED.

FILED
U.S. COURT OF APPEAL
ELEVENTH CIRCUIT
MAY 06 2003
THOMAS K. KAHN
CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CASE NO: 8:04-cv-1016-T-26TGW
8:02-cr-230-T-26TGW

ANTHONY HENRY MANGO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ORDER

This cause comes before the Court on Petitioner's motion to vacate, set aside, or correct an allegedly illegal sentence pursuant to 28 U.S.C. § 2255 (dkt. 1), the Government's Response (dkt. 8), and Petitioner's Reply (dkt. 11). The Court finds that the Section 2255 Motion is due to be denied. The Government's Response is thorough and well-reasoned and thus portions of the Response are adopted and incorporated in this Order.

Background and Procedural History

On May 30, 2002, a federal grand jury returned an indictment charging Petitioner with: (1) possessing

with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii) (Count One); (2) possessing a firearm in furtherance of a drug trafficking crime, that is the possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, as charged in Count One, in violation of 18 U.S.C. §§ 924(c)(1)(A)(I) and 924(c)(1)(D) (Count Two); and (3) possessing with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii) (Count Three). (Dkt. cr-1.)1

On August 22, 2002, the parties filed a plea agreement executed by Petitioner, his counsel, and the Government. (Dkt. cr-23.) Pursuant to the plea agreement, Petitioner agreed to plead guilty to Count One, the methamphetamine charge, (dkt. cr-23, p. 1), and the Government agreed to dismiss Count Two, the firearm charge, and Count Three, the cocaine charge, at the time of sentencing. (Dkt. cr-23, p. 3.) On August 26, 2002, Petitioner entered a plea of guilty to Count One of the

Indictment. (Dkt. cr-44.) Prior to sentencing, the United States Probation Office prepared a final Presentence Investigation Report ("the Report"). In the Report, the Probation Office ("Probation") concluded that Petitioner's base offense level should be set at level 38, in that he was responsible for

1 Citations to the docket sheet in the criminal case, No. 8:02-cr-230-T-26TGW, will be to "Dkt. cr-___." Citations to the docket sheet in the civil case, No. 8:04-cv-1016-T-26TGW, will be to "Dkt. cv-___." -2-
-3-

approximately 69 pounds (approximately 31 kilograms) of methamphetamine. See U.S.S.G. § 2D1.1(c)(1). Probation also concluded that Petitioner should receive a two level upward adjustment in his offense level because he possessed a firearm in connection with the offense. See U.S.S.G. § 2D1.1(b)(1).

Petitioner's counsel filed a Sentencing Memorandum and Incorporated Memorandum for Downward Departure ("Sentencing Memorandum"). He argued that Petitioner: (1) should be held responsible for only 29 pounds (approximately 13.15 kilograms) of methamphetamine, which would place him at base offense level 36, rather than at 38; and (2) should

not be held responsible for the firearm because it was unconnected to the offense, and hence that he should not receive the aforementioned two level upward adjustment. (Dkt. cr-29)

Petitioner was sentenced by this Court on March 14, 2003. (Dkts. cr-32 & 39) At the sentencing hearing, the Government called DEA Special Agent Chris Cascio ("SA Cascio") as a witness. SA Cascio testified that Robert Myers ("Myers"), who was convicted of conspiring to distribute methamphetamine in Case No. 8:02-cr-229-T-30EAJ, made a detailed statement regarding Petitioner. Myers alleged that Petitioner received large quantities of methamphetamine from him. Petitioner allegedly distributed some of this methamphetamine and stored for Myers what he did not distribute. Specifically, Myers alleged that in late April 2002, Petitioner took delivery of 29 pounds of methamphetamine. Myers further alleged that Petitioner previously had accepted

delivery of another approximately 40 pounds of methamphetamine from Petitioner. (Dkt. cr-39, p. 10.)

SA Cascio also testified at the hearing that approximately 5 pounds of methamphetamine were found in a duffel bag in the master bedroom of Petitioner's girlfriend. (Dkt. cr-39, p. 5.) SA

Cascio further testified that Petitioner himself admitted that he stored and distributed methamphetamine for Myers. Petitioner admitted that he received 8 to 10 deliveries of methamphetamine from Myers, ranging in size from 1 to 2 pounds. Petitioner then admitted that he accepted another 8 pound delivery of methamphetamine from Myers. Thus, SA Cascio testified that Petitioner admitted accepting delivery of from 16 to 28 pounds of methamphetamine from Myers. (Dkt. cr- 39, pp. 8-9.)

Additionally, SA Cascio also testified that he found a .380 caliber handgun on the top shelf of the closet where the methamphetamine was being stored. In directing SA Cascio to the closet, Petitioner said, "the stuff is in there and my gun is also in there." (Dkt. cr-39, pp. 10-11.)

Defense counsel called Petitioner as a witness at the sentencing hearing. Petitioner admitted accepting 8 to 10 deliveries of methamphetamine from Myers, ranging in size from 1 to 2 pounds. (Dkt. cr-39, p. 15.) Petitioner also testified that he accepted delivery of 8 pounds of methamphetamine from Myers on another single occasion. (Dkt. cr-39, p. 15.) Petitioner testified that the total weight of the methamphetamine he accepted from Myers was about 29 pounds. (Dkt. cr-39, p. 13.) Furthermore, Petitioner did not dispute

that the firearm was found in the closet with the methamphetamine. He simply asserted, "that [the firearm] just so happened to be in there. It wasn't there at the same time, had nothing to with the same situation."

The Court found that Petitioner was responsible for 37 pounds of methamphetamine (approximately 16.78 kilograms). The Court found that Myers had accepted delivery of the 29 pounds of methamphetamine in late April 2002. The Court further found that Myers was responsible for an additional 8 to 10 deliveries of methamphetamine from Myers , ranging in size from 1 to 2 pounds. Using the most conservative estimate, the Court determined that Petitioner was responsible for an additional 8 pounds of methamphetamine. The Court's findings placed Petitioner at base offense level 38. (Dkt. cr-39, p. 18.) The Court also found that a two-level upward adjustment for possession of a firearm was warranted. According to the Court, "it's one heck of a coincidence to be right there with the drugs." (Dkt. cr-39, p. 20.) The Court then gave Petitioner a three-level downward adjustment for acceptance of responsibility, which placed him at a total offense level of 37. (Dkt. cr-39, p. 26.) The Court finally determined that Petitioner's criminal history was overrepresented, and granted Petitioner a downward adjustment

from criminal history category II to criminal history category I. (Dkt. cr-39, p. 27.) Based on a total offense level of 37 and a criminal history category of I, Petitioner's guideline sentence was a term of imprisonment of between 210 to 262 months. The Court ultimately sentenced Petitioner at the low end of the range, to a term of imprisonment of 210 months. (Dkt. cr-39, p. 31.)
-6-

Petitioner filed a direct appeal on December 12, 2003. (Dkt. cr-36.) Petitioner argued that the Court erred in finding that the total weight of the methamphetamine attributable was 37 pounds rather than 29 pounds. Petitioner argued specifically that the Court's finding was based on Myers' statement, which was unreliable hearsay not subject to cross-examination. (Dkt. cv-8, ex. 1.) He also asserted that his offense level should not have been increased two levels due to his possession of a firearm. Petitioner argued that the Court deprived him of the full benefit of the plea agreement by basing his sentence upon the elements of a charge [the Section 924(c) charge] that was dismissed. Alternatively, Petitioner argued that the Court's finding that the firearm was connected to the methamphetamine possession was clearly erroneous. (Dkt. cv-8, pp. 7-9.) On May 6, 2003, the Eleventh Circuit Court of Appeals issued a per curiam order "dismiss[ing] th[e] appeal based

upon the appeal waiver in Appellant's plea agreement." (Dkt. cv-8, ex. 5.)

Petitioner's Section 2255 Claims

In Ground One, Petitioner alleges his counsel was ineffective at sentencing in that he failed to move to withdraw Petitioner's guilty plea when this Court found that Petitioner's offense level should be increased by two levels because a firearm was found with the methamphetamine. Petitioner alleges the Court's finding "deprived [him] of the full benefit of the plea agreement."

To establish a prima facie claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, (1984). Deficient

performance is performance which is objectively unreasonable under prevailing professional norms. Id. at 688. Prejudice results when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner fails to make a prima facie case of ineffective assistance of counsel. The Court cannot

find that counsel's failure to move to withdraw the plea was objectively unreasonable, as such a motion would have failed. Nothing in the plea agreement indicates that the Government would not seek the two-level enhancement for the firearm. In fact, the plea agreement specifically provides that the Government would retain its right and obligation to provide relevant information to the court and the probation office at its discretion, subject to the terms of the plea agreement, to recommend an appropriate disposition of Petitioner's case. (See dkt.cr-23, p. 10.) Further, the Magistrate Judge explained to Petitioner at length that this Court was not obligated to follow the plea agreement or the parties' recommendations. (Dkt. cr-44, pp. 17-18, 20-21, & 24.)2

Petitioner relies solely on United States v. Romano, 314 F.3d 1279 (11th Cir. 2002), to support his claim of ineffective assistance of counsel; however, the Romano case is factually distinguishable from the instant case. In Romano, the Eleventh Circuit found that the Government breached the plea agreement when it "strongly endorsed the probation officer's recommendation" "that the court enhance the defendant's base offense

2 The Magistrate Judge also advised Petitioner of

the potential maximum punishment and told him that his attorney's assessment of how the guidelines might apply to his case was only an estimate. (Dkt. cr-44, pp. 14-15 & 18.)

level based on conduct alleged in a dismissed count." Id. at 1281. But in Romano, the Government had expressly agreed not to oppose the defendant's recommendation that his offense level be determined without reference to the conduct alleged in the dismissed count. Id. at 1280. On appeal, the Government even conceded that the prosecutor had breached the plea agreement at sentencing. Id. at 1281.

Petitioner fails to make out a claim for breach of the plea agreement. In essence, he argues that counsel should have moved to withdraw the plea agreement simply because Petitioner was dissatisfied with the sentence he was to receive. The plea agreement, however, provided that "regardless of the guidelines calculated by the probation office or the court, defendant will not be permitted to withdraw defendant's plea pursuant to this plea agreement." (Dkt. cr-23, p. 12.) Petitioner fails to establish that counsel acted deficiently or that he was prejudiced in any way by counsel's acts or omissions.

In Ground Two, Petitioner argues that the

Court improperly relied upon an out-of-court statement of Myers in finding that Petitioner was responsible for 37 pounds, rather than 29 pounds, of methamphetamine. Petitioner asserts that the Court's reliance violated the Confrontation Clause of the Sixth Amendment, as interpreted by the Supreme Court in Crawford v. Washington, 124 S.Ct. 1354 (2004). Even if Petitioner could make out a Confrontation Clause claim, the Court is not convinced that Crawford should be applied retroactively. Nothing in the Crawford opinion suggests as much. The handful of courts that have specifically addressed the issue have opined that Crawford is not to be applied retroactively. See Evans v. Luebbers, 371 F.3d 438, 444-45 (8th Cir. 2004); Murillo v.

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Frank, 316 F. Supp. 2d 744, 749 (E.D. Wisc. 2004); Wheeler v. Dretke, 2004 WL 1532178 n. 1 (N.D. Tex. 2004); see also Chandler v. Moore, 240 F.3d 907, 918 (11th Cir. 2001).

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Petitioner's motion to vacate, set aside, or correct an allegedly illegal sentence pursuant to 28 U.S.C. § 2255 (dkt. 1) is **denied**. The Clerk shall enter judgment for the Government and close the above-styled civil case.

DONE AND ORDERED at Tampa, Florida, on August 17, 2004.

S/
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CASE NO: 8:04-cv-1016-T-26TGW

UNITED STATES OF AMERICA
v.
ANTHONY HENRY MANGO

ORDER

Defendant has filed herein Application for Certificate of Appealability (Dkt. 17) seeking to appeal from this Court's Order denying his 28 U.S.C. § 2255 motion. This Court must consider, therefore, whether to issue a certificate of appealability pursuant to 28 U.S.C., § 2253(c) and Fed. R. App. P. 22(b). An appeal may not be taken from a proceeding under § 2255 "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)"; and "[i]f an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." Fed.R.App.P. 22(b)(1). A certificate of appealability may issue "only if the applicant has

made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court, after review, finds that defendant has failed to make the requisite substantial showing.

ACCORDINGLY, it is hereby **ORDERED AND ADJUDGED** that the application for certificate of appealability (Dkt. 17) is **denied**.

DONE AND ORDERED at Tampa, Florida, on October 19, 2004.

s/
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

APPENDIX D
IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT
No. 04-15413-H

ANTHONY HENRY MANGO
Petitioner-Appellant

versus

UNITED STATES OF AMERICA
Respondent-Appellee

Appeal fom the United States District Court for
the Middle District of Florida

ORDER: Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. section 2253(c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEAL
ELEVENTH CIRCUIT
MAY 06 2003
THOMAS K. KAHN
CLERK